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NO. 87-614

IN THE

Supreme Court of the United States

October Term, 1987

RONALD W. SAPPENFIELD, et al.,
Petitioners

vs.

STATE OF INDIANA,
Respondent.

RESPONSE OF THE STATE OF INDIANA SUBMITTED AT THE REQUEST OF THE SUPREME COURT OF THE UNITED STATES

LINLEY E. PEARSON
Attorney General of Indiana

WILLIAM E. DAILY
Deputy Attorney General
Counsel of Record

Office of Attorney General
219 State House
Indianapolis, Indiana 46204
Telephone: (317) 232-6217

Attorneys for Respondent

Central Publishing Company, Inc., Indianapolis, IN 46208

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SUMMARY OF RESPONDENT'S POSITION

The federal government as well as Indiana and other state governments have enacted statutes (generally called RICO laws) which provide for the seizure and forfeiture of property used or obtained by criminals in a pattern of criminal activity. One of the criminal activities which may support seizure or forfeiture in some jurisdictions is the distribution of obscene material.

The distribution of obscene material is a lucrative crime. People who engage in this lucrative criminal activity are concerned that a vigorous application of RICO laws to their criminal activity will reduce profits. For that reason, there are a number of active lawsuits challenging the constitutionality of RICO legislation.

A case involving Arizona's RICO legislation, *Arizona v. Steven Feld, Larry Chabler*, No. 87-1246, is pending before this court on Arizona's petition for certiorari.

The attorney general of Indiana is currently defending the Indiana RICO statute in three cases in the United States District Court for the Southern District of the State of Indiana. It appears to be in the best interests of judicial economy as well as the best interests of the citizens in Indiana to have the Supreme Court of the United States issue a dispositive ruling on the issue of the constitutionality of RICO legislation. Such a ruling, if made after full argument on the merits by the parties, may be of great assistance to state and federal courts which are, or will be, wrestling with the issue.

For the foregoing reasons, the Respondent waived the filing of a brief in opposition to the petition for writ of certiorari under Rule 22.4. Subsequently, counsel for the Respondent was "directed" by the Clerk of the Supreme Court to file a "response" to the petition for certiorari.

Respondent believes that the issues raised by the Petitioners should be addressed and resolved by the Supreme Court of the United States after full argument on the merits.

STATEMENT OF THE CASE

The prosecuting attorney for Howard County, Indiana, filed charges in a state court under Indiana's criminal RICO statute (Indiana Code § 35-45-6-1 *et seq.*). The charging document alleged that Ronald W. Sappenfield and others had participated in a pattern of criminal activity arising out of the distribution of obscene material.

The Petitioners filed a motion to dismiss the RICO counts. The Petitioners argued that the Indiana RICO statute violated the First, Fifth, Sixth and Fourteenth Amendments to the constitution. The trial court granted the motion to dismiss. The Indiana Court of Appeals, relying on *4447 Corporation v. Goldsmith*, 504 N.E.2d 559 (Ind. Sup. Ct. 1987), reversed the trial court and reinstated the charges. The case relied upon by the

Indiana Court of Appeals is before this Court on a petition for certiorari *sub nom Fort Wayne Books, Inc. v. State of Indiana, et al.*, No. 87-470. The State of Indiana has filed a response in *Fort Wayne Books, Inc.* asking this court to grant certiorari and, after briefing and argument, decide the case on the merits.

SUMMARY STATEMENT OF THE ARGUMENTS IN SUPPORT OF THE RULING OF THE SUPREME COURT OF INDIANA

The Respondent desires to have the relevant issues fully briefed on the merits. In a brief on the merits, Respondent intends to present the following arguments which will be supported by references to relevant case law.

1. It is within the constitutional power of the State of Indiana to establish criminal penalties for the distribution of obscene matter.

2. The State of Indiana may constitutionally seize property used by an individual or organization in a pattern of criminal activity.

3. The State of Indiana may constitutionally seize property which is obtained as a result of a pattern of criminal activity.

4. The State of Indiana may constitutionally seize the property of an organization which is engaged in a pattern of criminal activity.

5. The Indiana RICO statute, which provides for a prompt adversarial hearing and places the burden of proof on the prosecuting attorney, does not deprive defendants of their due process rights.

6. The Court of Appeals of Indiana properly found that the terms of the Indiana RICO statute are not unconstitutional.

7. RICO statues are a legitimate and constitutional exercise of the police powers of state and federal governments.

8. The provisions of the Indiana RICO statute are not unconstitutionally vague.

This Court has not directly addressed the question of whether a bookstore can be closed or padlocked as a condition of a criminal conviction or as part of a racketeering or organized crime forfeiture or conviction order. Although it is often argued that a formal or constructive closure is impermissible where the business deals in pornographic and obscene materials, *See: Arcara v. Cloud Books, Inc.*, 478 U.S. ____, 92 L.Ed.2d 568, at 574 (1986), this issue is not settled.

Abating obscenity by closure orders as a public nuisance has been approved in certain circumstances in Ohio and Idaho. In Ohio, closure with release provisions for innocent landlords was approved. *State of Ohio, ex rel. Ewing v. Film Entitled "Without a Stich"*, 37 Ohio St.2d 92, 307 N.E.2d 911 (1974), appeal dismissed for want of a substantial federal question *sub nom Art Theatre Guild, Inc. v. Ewing*, 421 U.S. 923 (1975). In Idaho, the state Supreme Court held that a hard-core pornographic bookstore could be closed as a nuisance for one year after final trial establishing the obscenity of the materials as a penalty for past misconduct without being an unlawful prior restraint. *State of Idaho, ex rel. Kidwell v. U.S. Marketing, Inc.*, 631 P.2d 622 (1981). The store owners filed a "civil rights" and declaratory action in federal court. The District Court dismissed that suit on abstention grounds and on the court's "opinion...that the Idaho Moral Nuisance Abatement Act is not flagrantly and patently violative of express constitutional prohibitions in every clause". *U.S. Marketing, Inc. v. Leroy*, 524 F.Supp. 1277, at 1280 (D. Idaho, 1981). The store then filed a direct appeal in this Court, which noted jurisdiction on the issue of closure as a remedy in obscenity nuisance orders, 454 U.S. 1140 (Jan. 11, 1982). After an arson fire destroyed the bookstore, the defendant-appellant filed for unilateral dismissal of its appeal under Rule 53. Over the express objection of the State of Idaho, plaintiffs-appellees, the Clerk entered a dismissal of the appeal on March 10, 1982, 455 U.S. 1009. This was not a dismissal "by stipulation of parties" as indicated in *Avenue Book Store v. City of Tallmadge, Ohio*, 459 U.S. 997, 74 L.Ed.2d 393, at 394 (1982) (Justice White dissenting from denial of writ of certiorari).

In the Tallmadge case, the store was enjoined from disseminating any obscene material in the future, rather than closed, but the question of First Amendment impact on obscenity offenses and distribution of hard-core pornography was presented for review by this Court in a way which differs from the concern expressed in *Vance v. Universal Amusement Co.*, 445 U.S. 308, at 317 (1980) (See also, *Vance*, 445 U.S., at 320-25, Justices White and Rehnquist dissenting).

This Court's affirmance in *Brockett v. Spokane Arcades, Inc.*, 454 U.S. 1022 (1982), did not relate to the closure or obscenity injunction issues since the Court of Appeals expressed "no opinion with respect to what circumstances, if any, would justify a closure subsequent to a determination that conforms in all respects to the First Amendment", in *Spokane Arcades, Inc. v Brockett*, 631 F.2d 135, at 139 (9th Cir. 1980). The questions were put to this Court, but not resolved here, in *Sequoia Books, Inc. v. Illinois*, ____ U.S. ____, 56 L.W. 3283, 3285 (Oct. 19, 1987), denial of writ of certiorari to the opinion below, at 500 N.E.2d 82 (Ill. App. 1986).

The time is right for a ruling that courts can employ forfeiture and injunction remedies against a business which is proven to be violating obscenity and racketeering laws. State courts, such as those in Ohio, Idaho, Illinois, and Indiana appear ready and willing to fashion careful but strong remedies against illegal traffic in obscenity, and this Court should give them its express approval.

CONCLUSION

Pursuant to Rule 22.4, Respondent expressly waives the filing of a brief in opposition to the petition for certiorari. Respondent suggests that judicial economy may best be served by granting certiorari, joining this case with No. 87-470, and allowing the parties to brief and argue the issues on their merits. Respondent expressly reserves argument on the merits until certiorari is granted.

Respectfully submitted,

LINLEY E. PEARSON
Attorney General of Indiana

William E. Daily
Deputy Attorney General

Attorneys for Respondent